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In the Supreme Court of the United States

UNITED STATES OF AMERICA, ET AL., APPELLANTS

v.

AMERICAN LIBRARY ASSOCIATION, INC., ET AL.

ON APPEAL FROM THE UNITED STATES DISTRICT COURT FOR THE EASTERN DISTRICT OF PENNSYLVANIA

REPLY BRIEF FOR APPELLANTS

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The United States seeks plenary review of the three-judge district court's holding that the application of the Children's Internet Protection Act (CIPA) to public libraries is unconstitutional on its face under the First Amendment. CIPA specifies that decisions holding the challenged provisions unconstitutional "shall be reviewable as a matter of right by direct appeal" to this Court. Act of Dec. 21, 2000, Pub. L. No. 106-554, App. D, § 1741(b), 114 Stat. 2763A-352. Appellees defend the district court's decision, and the American Library Association appellees have filed a document styled motion to affirm. In the end however, appellees do not oppose plenary review in light of the important First Amendment issues raised. ALA Mot. to Aff. 26; Multnomah County Resp. 20.

Appellees' defense of the district court's holding is in any event unpersuasive. A public library's use of filtering software to prevent access to material that is obscene, child pornography, or harmful to minors falls within a public library's traditional authority to determine what material it will provide to its patrons. Especially in light of that traditional discretion, a public library's use of filtering software to restrict access to pornographic material does not violate the

First Amendment. The district court therefore erred in holding CIPA facially unconstitutional on the ground that its requirement that a library receiving federal assistance for Internet access must utilize filtering software to restrict access to pornographic material induces public libraries to violate the First Amendment. At the very least, the government's appeal of the district court's ruling condemning the use of filtering software raises a substantial First Amendment issue. For that reason, and because appellees do not oppose the government's request for plenary review, the Court should note probable jurisdiction of the government's appeal and set the case for plenary review.

A. A Public Library's Use Of Filtering Software Does Not Trigger Strict Scrutiny

1. Appellees contend that strict scrutiny applies to a public library's use of filtering software to prevent access to material that is covered by CIPA because a public library is analogous to a traditional public forum, such as a public street or park. ALA Mot. to Aff. 12; Multnomah County Resp. 12. That analogy is fundamentally misconceived. By history and tradition, the government plays no role in determining the content of expression in public streets and parks. See *Hague* v. *Committee for Indus. Org.*, 307 U.S. 496, 515 (1939). In contrast, by history and tradition, libraries—including public libraries—have always determined which material they will offer to their patrons. See J.S. 15. Thus, while content-based restrictions on expression in a traditional public forum are subject to strict scrutiny, a public library's content-based judgments regarding the material it will provide to its patrons are not.

If public libraries were equivalent to traditional public fora, as appellees suggest, a public library's content-based judgments regarding the books, magazines, and videos that it collects would also be subject to strict scrutiny. Such an approach would radically transform the traditional role of

public libraries, effectively removing from public libraries primary authority to decide what material to collect as a matter of discretion and transferring that authority to the courts as a matter of constitutional law.

Unwilling to defend the application of strict scrutiny to a library's traditional collection practices, appellees struggle to distinguish a library's use of filtering software on its own computers from other collection practices. For example, ALA contends (Mot. to Aff. 15) that the use of filtering software does not involve editorial judgment because the filtering companies create the filtering categories and determine the material that falls within each category. But public libraries exercise their own independent judgment in selecting the filtering software and categories that they will use, and public libraries have the capacity to unblock any material that has been erroneously blocked. See J.S. 18, 23. In addition, CIPA permits a library to disable the filtering software to allow patrons to gain access to blocked material for lawful purposes. See J.S. 23. Public libraries that accept federal assistance and use filtering software may therefore exercise the same kind of judgments that they exercise when they collect books, magazines, and videos.

ALA also asserts (Mot. to Aff. 15-16) that traditional content-based collection practices are passive and do not convey a message about the content of a book a library declines to purchase, while the use of screening software is active and has the effect of conveying the message that the library disfavors a website's content. But there is nothing passive about a library's decision not to collect pornographic magazines or xxx videos for its own patrons, and the public can readily discern that the absence of such material reflects a deliberate library policy that such materials are inappropriate for its collection even if that policy is not publicly announced. In any event, no decision of this Court suggests that the government may avoid strict scrutiny where it

would otherwise apply simply by keeping the basis for its decisions hidden from the public. ALA's attempted distinctions between the use of filtering software and other collection practices therefore do not withstand analysis.

Multnomah County argues (Resp. 15) that a public library's traditional collection practices are distinguishable from a library's use of filtering software because CIPA *mandates* filtering software for all public libraries and all users. CIPA does not impose any such mandate. CIPA applies only to those public libraries that voluntarily agree to use filtering software as a condition of receiving Internet-related federal assistance. Those voluntary decisions by public libraries in assembling their collections are entitled to just as much deference as other collection practices. CIPA's effect is the same as if a wealthy private donor contributed funds to a library to build its collection on the condition that it not use the funds to purchase pornographic materials. The First Amendment allows the library to honor conditions set by public as well as private donors.

2. Appellees' other grounds for urging application of strict scrutiny are equally unpersuasive. ALA argues (Mot. to Aff. 11-12) that strict scrutiny is applicable because the Internet is a unique medium for worldwide communication. A public library's use of filtering software, however, does not regulate the content of communication on the Internet or affect its dissemination throughout the world. Instead, the use of filtering software affects only the content that a public library provides to its patrons through its own computers. Appellees' focus on the nature of the Internet ignores that fundamental distinction between the government as a regulator of speech by private persons left to their own devices, and the government as a collector and provider of information using its own facilities.

A library's traditional collection practices illustrate that distinction. Like communication on the Internet, communication through books, magazines, and videos is entitled to the highest degree of constitutional protection. Thus, the government may not prevent the authors of books, magazines, or videos from distributing their works to willing recipients without satisfying strict scrutiny. But that does not mean that either the authors or individuals who may want to read their books may insist that a public library make the authors' works a part of the library's collection. The same is true of the Internet. If the work is not outside the protection of the First Amendment, and absent an overriding government interest, authors have a constitutional right to place their works on the Internet, and private individuals have a constitutional right to view them. But neither has a right to insist that a public library make those works available through its Internet-connected computers.

Finally, Multnomah County argues (Resp. 12) that strict scrutiny is warranted based on this Court's government funding cases. However, those cases establish that government has broad discretion to make content-based decisions regarding what expression to fund. See *NEA* v. *Finley*, 524 U.S. 569, 585-588 (1998); *Arkansas Educ. Television Comm'n* v. *Forbes*, 523 U.S. 666, 672-675 (1998); *Rust* v. *Sullivan*, 500 U.S. 173, 193-194 (1991). They do not suggest that content-based funding decisions are subject to strict scrutiny.

Legal Services Corp. v. *Velazquez*, 531 U.S. 533 (2001), cited by Multnomah County (Resp. 12 n.5), does not hold that content-based funding decisions are subject to strict scrutiny. In that case, the Court applied strict scrutiny because the government refrained from funding certain speech based on the anti-government viewpoint of the speaker, and that funding decision interfered with the proper functioning of the Judicial Branch of government. Neither of those unique factors is present here.

B. The Use Of Filtering Software Constitutionally Advances The Government's Interest In Preventing Access To Material That Is Obscene, Child Pornography, Or Harmful To Minors

Appellees argue that the use of filtering software is not "narrowly tailored" to serve the government's interests. ALA Mot. to Aff. 16-22; Multnomah County Resp. 13-15. Because a library's traditional collection practices are not subject to strict scrutiny, a library's use of filtering software need not satisfy strict scrutiny's narrow tailoring requirement. Regardless of the standard of review, however, the use of filtering software is a permissible method to further the government's compelling interest in preventing access to material that is obscene, child pornography, or harmful to minors. It follows that Congress may prevent federal assistance from being used in a manner that would facilitate that access.

1. Appellees' principal constitutional objection to filtering software is that it erroneously blocks what in their view is a significant amount of constitutionally protected material. ALA Mot. to Aff. 17; Multnomah County Resp. 14-15. A public library, however, does not have an obligation to add material to its collection simply because the material is constitutionally protected. Public libraries regularly decline to include hundreds of thousands of constitutionally protected books, magazines, and videos in their collections. A library's decision not to provide constitutionally protected material through its Internet-connected computers raises no greater constitutional concern.

Moreover, a public library may reasonably decide that, in order to avoid making certain inappropriate material available to its patrons, it will also decline to make available certain material that may be worthwhile. For example, a public library may decide not to collect a particular magazine because of its pornographic pictures, even though that same

magazine might contain worthwhile interviews with public figures. Relying on a similar judgment, a public library may decide to use filtering software that blocks material that is obscene, child pornography or harmful to minors, even though it may also block some material that falls outside those specific categories.

Appellees also fail to come to grips with the following critical facts: screening software overblocks only a small percentage of the total content of the Internet; much information that is blocked can be found elsewhere; and any library may unblock a site that has been erroneously blocked. See J.S. 23. Appellees raise several objections to the significance of those facts, but each is unpersuasive.

First, appellees refer to the amount of overblocking as "vast." ALA Mot. to Aff. 17; Multnomah County Resp. 13. In fact, however, filtering software erroneously blocks a fraction of 1% of the material on the Internet. J.S. 23. Second, ALA asserts (Mot. to Aff. 19) that there is no evidence that erroneously blocked information can often be found elsewhere. But the evidence shows that public libraries often carry books containing information on sensitive sexual issues. J.S. 23. The evidence also shows that when a search was performed using the term "breast cancer," the first 50 sites were not blocked. *Ibid.* There is nothing unique about those examples. They provide ample support for the conclusion that much information that is blocked can be found in other ways.

Third, ALA contends (Mot. to Aff. 20) that the possibility of unblocking is constitutionally inadequate because CIPA does not *require* a public library to unblock an erroneously blocked site. However, the more salient fact is that CIPA does not *prevent* a public library from unblocking an erroneously blocked site. Appellees have offered no evidence to suggest that libraries will not respond to reasonable unblocking requests just as they respond to other reasonable

patron requests. In any event, the possibility that a particular library might decide not to unblock a site does not render CIPA unconstitutional on its face.

Fourth, appellees assert that library patrons may be too embarrassed to ask for sites to be unblocked. ALA Mot. to Aff. 20- 21; Multnomah Resp. 16-17. But library patrons are accustomed to asking for assistance from librarians, *e.g.*, to locate material in the collection, to retrieve books on reserve, or to borrow materials from another library. There is no reason to anticipate that they will be any less willing to ask for assistance in obtaining information from the Internet. Moreover, appellees' notion that there is a constitutional right to acquire information in a public library without any risk of embarrassment is insupportable. Library patrons can always be observed by librarians and other members of the public; patrons must ordinarily identify themselves in order to check out material; and libraries make a record of the material that patrons check out. Those standard operating procedures may deter some persons from using a public library to acquire information, but that does not mean that a library's standard operating procedures are unconstitutional.

2. Appellees also contend that the use of filtering software is not narrowly tailored because there are alternatives that are less restrictive, such as the optional use of blocking software, enforcement of Internet use policies, training in Internet usage, steering patrons to selected sites, installation of privacy screens or recessed monitors, and placing unblocked computers in segregated areas. ALA Mot. to Aff. 21-22; Multnomah Resp. 14-15. But in deciding what information to collect from the Internet, a public library is not required to pursue the least restrictive alternative. A public library instead has considerable flexibility in deciding on the best approach.

In any event, most of the alternatives appellees have identified are directed to assisting individuals who wish to

avoid exposure to material that is obscene, child pornography, or harmful to minors and do not address the government's compelling interest in preventing the deliberate use of library computers to obtain access to such material and Congress's manifestly legitimate interest in preventing the use of federal assistance to facilitate such conduct. Enforcement of standard use policies would address those interests to an extent. But if enforcement took the form of aggressive monitoring of Internet use, that alternative would be more restrictive than the use of filtering software and would have a number of other undesirable consequences. See J.S. 25-26.

C. Appellees' Other Challenges Do Not Provide A Basis For Failing To Grant Plenary Review Of The Question Presented

Appellees argue that the district court's judgment may be affirmed on the alternative grounds that CIPA imposes an unconstitutional condition on the exercise of First Amendment rights, and that a library's use of filtering software constitutes an impermissible prior restraint on speech. ALA Mot. to Aff. 22-26; Multnomah County Resp. 17-19. The district court, however, did not resolve either of those contentions, and they are not directly presented here. Those contentions are in any event without merit.

1. Although ALA asserts an unconstitutional conditions claim (Mot. to Aff. 23-26), the courts of appeals that have addressed the issue have concluded that governmental entities, like public libraries, do not have First Amendment rights of their own. See J.S 27 n.6. ALA makes no effort to demonstrate that those holdings are incorrect. Instead, it argues (Mot. to Aff. 24) that CIPA imposes an unconstitutional condition on the First Amendment rights of library patrons. But ALA does not cite any decision of this Court that suggests that unconstitutional conditions analysis applies when the recipient of federal assistance itself lacks a viable constitutional claim. Moreover, ALA's assertion of an

unconstitutional conditions claim on behalf of library patrons collapses with appellees' claim that CIPA induces public libraries to violate the First Amendment rights of their patrons. For the reasons previously discussed, the latter claim is unmeritorious. Moreover, this Court's unconstitutional conditions cases establish that Congress may define a federally assisted program to include limits on speech-related activity, as long as federal recipients may engage in such activity outside the federal program. J.S. 27 n.6. Because CIPA permits libraries to decline to use filtering software at branches that do not receive Internet-related federal assistance, that standard is satisfied here.

2. Appellees' reliance (ALA Mot. to Aff. 22-23; Multnomah County Resp. 17-19) on the presumption against prior restraints is also misplaced. A library's use of filtering software does not impose a "restraint" on Internet content. The content that a filter blocks remains on the Internet and may be obtained from millions of computers throughout the world. A library's decision not to provide such material through its own computers is a collection decision, not a restraint on private speech. Acceptance of appellees' contrary view would lead to the remarkable conclusion that public libraries engage in prior restraints when they fail to provide pornographic magazines or xxx videos to their patrons.

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For the foregoing reasons, as well as those set forth in the jurisdictional statement, the Court should note probable jurisdiction.

Respectfully submitted.

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